CENTER FOR REPRODUCTIVE RIGHTS

Judge Kavanaugh's Judicial Record on the Liberty Right to Medical Decision-Making

***Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376, 380 (D.C. Cir. 2007)**

Doe ex rel. Tarlow v. *D.C.* dealt with the extent to which people with intellectual disabilities have a liberty right to express their wishes about their own health care, including whether to have an abortion.

- It shows that Judge Kavanaugh embraces a narrow approach to defining liberty rights that looks to "history and tradition."
- The people whom Judge Kavanaugh held lacked a liberty right to medical decision-making had been forced to have abortions against their wishes. Judge Kavanaugh's opinion shows that a narrow approach to liberty impacts rights across the board – not just the right to abortion.
- Judge Kavanaugh has embraced a consistently narrow approach to defining liberty in speeches discussing reproductive rights, and in *Garza v. Hargan*, dealing with the abortion rights of an immigrant minor.

Case Facts

Adult women with intellectual disabilities who received medical services from the District of Columbia through the Mental Retardation and Developmental Disabilities Administration (MRDDA) brought action against MRDDA policy governing consent to surgery, including a claim that it violated their Fifth Amendment liberty right to accept or refuse medical treatment, which was part of their right to bodily integrity.

While the case was not limited to the right to consent to abortion (it involved consent to surgical procedures generally), two of the Jane Doe plaintiffs alleged that they had been forced to have abortions under the challenged policy, even while one alleged that she refused the District's request that she have an abortion (and she had previously given birth to a healthy child without disabilities), and the other alleged that she had decided she wanted to carry to term.[1]

Under the policy, when determining whether to authorize surgery, the District did not need to "consider the health wishes of intellectually disabled patients" who had never in the past been legally competent to consent to health care. The plaintiffs argued that the government was constitutionally required to try to ascertain and consider such patients' wishes. The district court agreed, finding that plaintiffs had shown a likelihood of success on their claim that they had a right of bodily integrity that was violated when the government made no attempt to determine their wishes or concerns about their medical care. The court ordered the District to

[1] The facts are discussed in the District Court opinion, *Does I through III v. D.C.*, 232 F.R.D. 18, 20 (D.D.C. 2005). Judge Kavanaugh does not discuss abortion in this appellate opinion.

make "reasonable efforts to communicate" with patients "regarding their wishes," and to use a "best interests" standard if their wishes remained unknown.

Judge Kavanaugh's Opinion – Policy that Allowed the Government to Authorize Abortions without Consulting Patients with Intellectual Disabilities did not Violate their Liberty Rights

Judge Kavanaugh authored the opinion reversing the district court and upholding the policy, casting doubt on whether a substantive due process claim even applied, and taking a narrow view of such rights that the "history and tradition" approach entails (an approach that he has endorsed in public speeches, as discussed below).

He wrote that "[e]ven assuming their complaint about procedures used by MRDDA can be properly shoehorned into a substantive due process claim, **plaintiffs have not shown that consideration of the wishes of a never-competent patient is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [the asserted right] were sacrificed."** Judge Kavanaugh also wrote that "the breadth of plaintiffs' constitutional claims is extraordinary because no state of which we are aware applies the rule suggested by plaintiffs." Accordingly, he held that the plaintiffs' liberty claims were "meritless."

Judge Kavanaugh failed to grapple with the nation's reprehensible history of government actions that deprive people with disabilities of reproductive autonomy. For example, he did not discuss cases like *Buck v. Bell*, 274 U.S. 200 (1927), in which the Court rejected that forced sterilization violated the liberty rights of a woman believed to have an intellectual disability. *Buck* is widely regarded as among the Supreme Court's most egregiously flawed decisions, given its logic that "[i]t would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." Kavanaugh's cursory dismissal of the plaintiffs' claims in *Tarlow* is difficult to justify against the shameful legal backdrop of the *Buck* decision.

On remand, *Doe v. D.C.*, 206 F. Supp. 3d 583, 595 (D.D.C. 2016) the plaintiffs amended their complaint to allege specifically that the District violated their liberty right to be free from forced abortion by consenting to their abortions without court orders. The district court judge held that avoiding a forced abortion is a constitutionally cognizable liberty right under the Due Process Clause, and that the District had violated it. At that stage of the litigation, material in the record indicated that the women had actually been deemed legally competent to make reproductive health decisions at various times in their lives, and one had been deemed competent to make her own abortion decision, which the District ignored when it authorized her abortion. This later district court opinion includes an extensive discussion of the premise of substantive due process rights, stating that "intellectually disabled individuals" retain liberty protections, and tying the right to be free from forced abortion to the rights to procreation, contraception, and refusal of unwanted medical treatment. While Judge Kavanaugh was never presented with these additional claims and facts brought later in the case, the lower court's thoughtful liberty analysis contrasts and highlights Kavanaugh's narrow and cursory approach to substantive due process in this case.

Judge Kavanaugh on How to Analyze Reproductive Liberty Rights – Apply History and Tradition

In line with his *Doe ex rel. Tarlow* approach, in public speeches Judge Kavanaugh has embraced an analytical method that looks to "history and tradition" to narrowly define liberty rights, specifically reproductive rights. In a speech he delivered at the American Enterprise Institute in September 2017,[2] **Judge Kavanaugh praised Justice Rehnquist's dissenting opinion in *Roe v. Wade*, in which Rehnquist wrote that the Constitution does not protect abortion as a fundamental right.** Kavanaugh recapped Rehnquist's view that "any such unenumerated right had to be rooted in the traditions and conscience of our people," writing that while Rehnquist could not convince the other justices that he was correct in *Roe* or later cases such as *Planned Parenthood v. Casey*, "he was successful in stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition."

In a speech that he delivered at Notre Dame in 2017,[3] Judge Kavanaugh similarly recalled Justice Scalia's advice: "don't make up new constitutional rights that are not in the text of the Constitution." In particular, Judge Kavanaugh remarked that Scalia rejected "balancing tests" to decide constitutional cases, instead favoring an approach that looked to "history and tradition." Judge Kavanaugh noted that Justice Breyer had applied a balancing test to decide whether the abortion restrictions in *Whole Woman's Health v. Hellerstedt* (the Supreme Court's most recent abortion access case) imposed an undue burden. Without directly rejecting Justice Breyer's approach, Judge Kavanaugh said that Scalia's call for "judges to focus on history and tradition" might better guide their decision-making on constitutional rights.

Garza v. Hargan[4] – A Narrow View of Liberty Rights

Judge Kavanaugh's narrow approach to defining liberty is evident in his only case directly addressing the right to abortion, *Garza v. Hargan*. *Garza* involved an unaccompanied immigrant minor—Jane Doe (J.D.), represented by the ACLU—who requested an abortion while in federal detention. Even after J.D. had fulfilled all state law requirements to obtain the abortion and arrangements had been made that would require no participation by the federal government, the government nonetheless refused to allow J.D. to travel to the clinic. In response to a federal lawsuit and appeal, Judge Kavanaugh voted to block J.D.'s abortion for at least 11 more days, issuing an order asserting that the federal government would not impose an undue burden on Jane Doe's right to abortion if it could find a sponsor who would remove her from custody "expeditiously." The en banc Court of Appeals for the D.C Circuit reversed, with Kavanaugh in dissent.

Kavanaugh rejected the majority's conclusion that the government had imposed an undue burden, calling it "ultimately based on a constitutional **principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand**, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision."

Judge Kavanaugh did not explicitly apply a history and tradition analysis to conclude that the government could continue to block J.D.'s abortion. However, by faulting the majority for recognizing what he called a

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[2] "From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist" at the American Enterprise Institute (Sept. 18, 2017).
[3] Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions, 92 NOTRE DAME L. REV. 1907 (2017).
[4] *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc).

"new right," he implied that the Constitution's liberty protections are static (while ignoring that the government's action was clearly unconstitutional under existing precedent, as the majority held, and in fact no "new rights" were in play). Taken together, Judge Kavanaugh's opinions and speeches suggest that he would narrowly define liberty by looking to history and tradition. Rights that did not exist or were not recognized in the past – among them the right to medical decision-making for people with intellectual disabilities, the right to abortion, and sexual and marriage rights for same sex couples – may not have a place in Judge Kavanaugh's jurisprudence.